BRF128

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERTO ANTONIO GÓNZALEZ-CALLES,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ATTORNEY FOR PETITIONER

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FIRST QUESTION PRESENTED

Whether the Circuit Court improperly held that a prompt curative instruction during the last jury argument rendered harmless prosecutor Wolfe's devastating accusation petitioner had serious similar extraneous cocaine smuggling offenses where:

(1) no evidence had been introduced to support the prosecutorial assertion that petitioner is the "virus that spreads it (the cancer of cocaine) through his airplanes ... he had flown" (Pet.App. 112-113);

(2) earlier the district court had specifically instructed this prosecutor at pretrial not to make any reference whatever to extraneous offenses without first approaching the bench;

(3) this prosecutor responded at pretrial both that he would comply with that court order; and that while there was evidence petitioner entered the country on numerous occasions, this prosecutor did not think that was evidence of other crimes, since the evidence "doesn't say that on the other occasions they were hauling cocaine or anything";

(4) the prosecutor deliberately violated the trial court's instruction and his own promise to the district court and defense counsel to first approach the bench before getting into this area;

(5) the circuit court characterized as "weak" the evidence of petitioner's guilt;

(6) petitioner testified asserting as his sole defense his lack of knowledge of the odorless, hidden contraband;

(7) absent the prosecutor's prejudicial reference to not only past but future extraneous cocaine smuggling offenses by petitioner, the jury might not have returned its verdict of guilty;

(8) petitioner timely and properly requested the district court grant a mistrial as to the past similar acts; and

(9) the trial court overruled petitioner's objection to the future similar acts speculation by prosecutor Wolfe.

SECOND QUESTION PRESENTED

Whether the Circuit Court improperly failed to hold that the district court committed plain error and petitioner was denied a fair trial when the district court instructed the jury that "... you can infer a person has possession over something [the contraband] if ... he is the driver of a vehicle or pilot of a plane or the like" (emphasis added), since petitioner had testified explaining that his sole defense was that although he was the hired pilot of the plane, he did not know the plane was loaded with contraband.

THIRD QUESTION PRESENTED

Whether the Circuit Court improperly affirmed, since there had been a violation of the constitutional principle that nothing can be added to an indictment without the concurrence of the indicting grand jury, where (1) the grand jury charged in the indictment's count 2 that petitioner violated the law by importing marihuana; (2) but on that count 2 petitioner was convicted for importing cocaine; (3) the petitioner and his counsel agreed "to amend the indictment if it could legally be done"; and (4) without resubmission to the grand jury, the prosecutor immediately crossed out the word "marihuana" in the indictment and replace it with the word "cocaine".

FOURTH QUESTION PRESENTED

Whether the Circuit Court incorrectly relied on "airplane trim evidence" when the parties' attorneys both in effect explained during jury final argument that based on the evidence before the jury, "trim" was not a part of this lawsuit.

FIFTH QUESTION PRESENTED

Whether the evidence is insufficient to support the conviction on each count, where the circuit court affirmed petitioner's conviction but characterizes the evidence as "this is a close case" and "we might have reached a different result had we been the jurors in this case."

LIST OF ALL PARTIES BELOW

The parties at the Fifth Circuit were the same as in this Court.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. However, certain of Gonzalez' issues are already pending now but are unresolved by this Court. See Ray v. United States, ___ U.S. ___, 107 S.Ct. 454, 93 L.Ed.2d 400 (1986); Salgado v. United States, 86-1386.

IDENTITY OF DEFENSE COUNSEL BELOW

Gonzalez was represented at the District and Circuit Courts by attorney Joseph A. Connors III.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	
FIRST	i
SECOND	iv
THIRD	v
FOURTH	vi
FIFTH	vii
LIST OF ALL PARTIES BELOW	viii
STATEMENT OF RELATED CASES	viii
IDENTITY OF DEFENSE COUNSEL BELOW	viii
THIS TABLE OF CONTENTS	ix
TABLE OF AUTHORITIES	
Cases	xi
Statutes	xiv
Rules	xiv
United States Constitution	xiv
TABLE OF CONTENTS TO APPENDIX TO THIS PETITION	xv
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	6

ARGUMENTS FOR GRANTING WRIT

Reasons For Reviewing:

FIRST QUESTION 17
SECOND QUESTION 30
THIRD QUESTION 39
FOURTH QUESTION 44
FIFTH QUESTION 57

CONCLUSION 63

APPENDIX ATTACHED TO PETITION FOR WRIT OF CERTIORARI 66

RELEVANT CONSTITITIONAL, STATUTORY AND RULE PROVISIONS

Fifth Amendment 67

28 U.S.C.
1254(1) 67
1291 68

18 U.S.C.
3231 68
2 68

21 U.S.C.
812 69
841 71
846 74
952 75
960 75
963 77

28 U.S.C. 2111 77

Fed.R.Cr.Proc.
52 77

TABLE OF AUTHORITIES

Page

Cases

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 21

Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) 34-35

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) 6, 57-58

Griego v. United States, 298 F.2d 845, (10th Cir. 1962) 33

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) 21

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 58

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 58,63

Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, ___ L.Ed.2d ___ (1969) 35

Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) 42

United States v. Carroll, 582 F.2d 942 (5th Cir. 1978) 42-43

United States v. Consolidated Launderies Corp., 291 F.2d 563 (9th Cir. 1961) 43

United States v. Del Alguila-Reyes, 722 F.2d 155 (5th Cir. 1983) 37

United States v. Escobar De Bright, 742 F.2d 1196 (9th Cir. 1984) 31

United States v. Glasgow, 658 F.2d 1036 (5 Cir. 1981) 61

United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) 21-22

United States v. Jackson, 700 F.2d 181 (5th Cir. 1983), cert. denied, 464 U.S. 842, 104 S.Ct. 139, 78 L.Ed.2d 132 (1983) 60

United States v. Jackson, 526 F.2d 1236 (5th Cir. 1976) 62

United States v. Ledesma-Hernandez, 729 F.2d 310 (5th Cir. 1984) 37

United States v. Littrell, 574 F.2d 828 (5th Cir. 1978) 60

United States v. Miller,
471 U.S. ___, 105 S.Ct. 1811,
85 L.Ed.2d 99 (1985) 40

United States v. Murdock,
290 U.S. 389, 54 S.Ct. 223,
78 L.Ed. 381 (1933) 32

United States v. Musgrave,
444 F.2d 755 (5th Cir.
1971) 32-33

United States v. Musgrave,
483 F.2d 327 (5th Cir. 1973),
cert. denied, 414 U.S. 1023,
94 S.Ct. 447, 38 L.Ed.2d 315
(1973) 44

United States v. Norris,
281 U.S. 619, 50 S.Ct. 424,
74 L.Ed. 1076 (1930) 40

United States v Ramirez,
670 F.2d 27 (5th Cir. 1982) 44

United States v. Stephenson,
474 F.2d 1353
(5th Cir. 1973) 61

United States v. Stewart
Clinical Laboratory, Inc.,
652 F.2d 804 (9th Cir. 1981) 43

United States v. Williams-
Hendricks, 805 F.2d 496
(5th Cir. 1986) 59,61

United States v. Young, ___
U.S. ___, 105 S.Ct. 1038,
___ L.Ed.2d ___ (1985) ... 23

Vaccaro v. United States,
461 F.2d 626, (5th Cir.
1972) 34

Statutes

18 U.S.C.
2 2,4-5
3231 2
1291 2

21 U.S.C.
812 2
841 2
841(a)(1) 4-5
841(b)(1)(A) 4-5
846 2,4
952 2
952(a) 3-4
960 2
960(b)(1) 3-4
963 2-3

28 U.S.C.
1254(1) 2
1291 2
2111 2

Rules

Fed.R.Cr.Proc.
52 2

United States Constitution

Fifth Amendment 2,42
Due Process Clause 30,34,38

TABLE OF CONTENTS TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

	Page
TABLE OF CONTENTS	2
ORDER DENYING REHEARING	3
CIRCUIT COURT'S JUDGMENT	4
CIRCUIT COURT'S OPINION	5
DISTRICT COURT'S JUDGMENT	41
INDICTMENT	44
ALL DEFENDANTS' MOTION IN LIMINE AND FOR NOTICE BY THE GOVERNMENT OF THE INTENTION TO RELY UPON OTHER CRIMES EVIDENCE AND FOR A CONTINUANCE UNTIL SUCH NOTICE IS GIVEN WITH SUPPORTING MEMORANDUM ...	48
DISTRICT COURT'S ENTIRE FINAL CHARGE TO THE JURY	66
RELEVANT JURY ARGUMENT	109

TO THE UNITED STATES SUPREME COURT:

Petitioner Roberto Antonio Gonzalez-Calles respectfully prays that a writ of certiorari issue to review the December 17, 1986 judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions and judgments of the district court and the circuit court (Pet.App. 3-39)[1] are unreported.

JURISDICTION

This appeal stems from conviction of crimes against the United States. The district court for the Southern District

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[1] Citations to the Appendix to the petition for writ of certiorari will be to its pages as "Pet.App. ___". Record citations will be to "R.__" (pp. 1 to 201) for the Clerk's Record and to the Reporter's Transcript as "1T.__" (pp. 1 - 200), "2T.__" (pp. 201 to 400), "3T.__" (pp. 401 to 600), and "4T.__" (pp. 601 to 734).

of Texas, Brownsville Division had jurisdiction under 18 U.S.C. 3231. The circuit court had jurisdiction under 28 U.S.C. 1291. Its judgment and opinion were entered on December 17, 1986. (Pet.App. 3-39.) The petition for rehearing was overruled on January 26, 1987. (Id. at 2.) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The numerous applicable rules, statutes, and constitutional provisions are printed in the appendix attached to the conclusion of this petition. (App.Attach.Pet. 66-77.) They are: Fifth Amendment, U. S. Constitution; 18 U.S.C. 2, 3231; 21 U.S.C. 812, 841, 846, 952, 960 and 963; 28 U.S.C. 1254(1), 1291 and 2111; and Fed.R.Cr.Proc. 52.

STATEMENT OF THE CASE

On February 11, 1986, Carlos Benjamin Gonzalez-Calles and this petitioner were originally indicted in a four-count indictment in Cause No. B-86-049. (R. 5-6.) Its Count 1 alleged that "from on or about January 16, 1986, to on or about January 18, 1986" each named defendant knowingly and intentionally conspired "with each other and with other persons unknown to the Grand Jurors to unlawfully import into the United States from a place outside the United States a quantity of cocaine," in violation of 21 U.S.C. 963, 952(a) and 960(b)(1). Count 2 alleged each named defendant knowingly and intentionally imported into the United States from a place outside of the United States approximately 125 pounds (gross

weight) of "marihuana"[2] on or about January 18, 1986, in violation of 21 U.S.C. 952(a) and 960(b)(1) and 18 U.S.C. 2. Count 3 alleged that "from on or about January 16, 1986, to on or about January 18, 1986," each named defendant knowingly and intentionally conspired "with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute a quantity of cocaine," in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(A). Count 4 alleged each named defendant knowingly and intentionally possessed, with intent to distribute, approximately 125 pounds

---

[2] In his third question presented, petitioner is raising the legal issue as to whether or not the U.S. Magistrate could legally permit prosecutor Guerra to amend the indictment by crossing out the word "marijuana" and replacing it by the word "cocaine".

(gross weight) of cocaine on or about January 18, 1986, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A) and 18 U.S.C. 2. (R. 5-6.)

On February 20, 1986, petitioner pled not guilty. (R. 7.) Trial was had before a jury from April 7 through 10, 1986. (1T. 25 to 4T. 726.) The jury found petitioner guilty of all four counts. (R. 7, 14.) On May 15, 1986, the trial court imposed sentences on petitioner of ten years imprisonment on each count to run concurrently. $50 special assessments were imposed on each count for a total of $200. Written notice of appeal was timely filed on May 23, 1986. (R. 8.) The circuit court entered its judgment of affirmance on December 17, 1986. (Pet. App. 3.) Petitioner is presently incarcerated serving the sentence herein.

STATEMENT OF THE FACTS

Viewing the evidence and all reasonable inferences which may be drawn therefrom in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the jury trial evidence shows these events occurred.

The government presented its evidence. (1T. 55 to 2T. 390.) The defense presented its evidence. (3T. 407 to 4T. 638.) There was no rebuttal.

On January 18, 1986, at approximately 5:05 p.m., petitioner and his brother arrived at the public airport in McAllen, Texas, aboard a 1972 Cessna Skywagon Model 185, a single-engine airplane. Petitioner was the pilot of the plane, and his brother was a passenger. Petitioner and his brother disembarked, and brought their

luggage to customs for inspection. They made a negative declaration, saying that they were not bringing anything into the United States. (1T. 120-126, 163.)

While petitioner and his brother were in the customs office, customs agent Louis D. Hall boarded the plane with his dog, Royker, which was trained to detect narcotics, to conduct a search of the plane. Royker indicated that drugs were present in the plane, and customs agents Andreas Funk and Thomas J. DeMichelle entered the plane to search it. (1T. 92-97, 165; 2T. 326-327.) After determining that no contraband was visible (2T. 346), agent DeMichelle noticed a small tear in a vinyl partition in the rear bulkhead of the plane. Upon enlarging the hole and shining a flashlight inside, the agent was able to

see plastic bags in the compartment behind the bulkhead. A knife was inserted into the hole, and a white powder was on the knife when it was withdrawn. This powder field tested positive for the presence of cocaine. (1T. 165; 2T. 326-328.) The agents then removed the screws securing the bulkhead and discovered three large plastic bags, weighing approximately 125 pounds, and containing approximately 110 pounds net weight of cocaine. (1T. 61-67, 131, 166.) The bags were tested for fingerprints, and some were obtained, but these did not match the fingerprints of either petitioner or his brother. (1T. 166; 2T. 332.)

After the discovery of the cocaine, petitioner and his brother were arrested and advised of their Miranda rights. (1T. 168-169.) Petitioner made statements to

the effect that he did not know that the cocaine was in the airplane. (1T. 173-174.) Petitioner "had a piece of registration from Guatemala and it stated that it [the plane] belonged to their brother ... Victor Gonzalez." (2T. 344.) Petitioner had letters in his possession authorizing him to take the airplane to Hobby airport in Houston for repairs and from a Roger Delgadillo who was going to buy the plane from Victor. Petitioner also had $700 in cash for his expenses. (2T. 516-520.)

Frank Medina, a DEA chemist from Dallas, Texas (1T. 55), testified there were a total of 50 packages, each weighing about one kilo. The substance in those packages was L-cocaine that comes from the coca plant. 50,478 grams was the actual cocaine's net weight of the 50 packages.

That was 111 3/4 pounds of 95 percent pure cocaine. (1T. 61 to 76.)

U.S. Customs Service agent Louis D. Hall testified that on January 18, 1986, he and his dog ROYKER helped find the cocaine in the plane. That cocaine does not have an odor that ordinary humans can detect. The dog's smell is about 150 to 200 times greater than a human's smell, so humans can not discriminate that odor like the dog can. (1T. 91 to 109.)

U.S. Customs Officer David Longoria testified that over one hour advance notice of the defendants' arrival had been received by the Federal Aviation Administration (FAA). The FAA contacted Customs. That is the way it is supposed to happen on any aircraft. Longoria inspected petitioner's baggage and did not find the smallest trace of cocaine. No

pistol was found in the luggage or on the plane. (1T. 120 to 143.)

Immigration Service employee Cesar Martinez testified that he reviewed petitioner's El Salvador passport which showed that petitioner had entered the U.S. "approximately 39" documented or stamped times since May 27, 1981. The majority of those documented entries were at Miami, Florida or Port Everglades, Florida. The other countries listed were: Guatemala, the Cayman Islands, and Costa Rica. Martinez did not find anything illegal about that passport. (1T. 144-158.)

Customs' special agent Andreas Funk testified that petitioner's flight plan agreed with what petitioner had told Inspector Longoria: that petitioner had

left Guatemala City, fueled in Veracruz and proceeded to McAllen. (2T. 237.)

U.S. Customs pilot Louis L. Picciano explained "pitch", "adjusting an airplane's pitch" and "the trim wheel." He testified that if the second compartment (shown in Government's Exhibit 15) contained 125 pounds of material, that would cause a pilot to adjust his pitch. As the pilot would start feeling pressure during takeoff, he would reach down and start the forward trim. "It should get your attention without a doubt." (2T. 276-283.) He also described the plane's center of gravity (CG). He described trimming as "Just something you do by instinct, experience and feel. ***** It is instinct. When you take off, you run it forward and pull it back in take off position." (2T. 286-288.) As an

experienced pilot, trimming TG-BEQ would have "instinctively" come to petitioner. "It wouldn't be something that he would be thinking about." (2T. 302-303.) 125 pounds of cocaine on "a hypothetical 185 like the BEQ..."is not much weight. Just where it is sitting." (2T. 306-307.) "There is no plane you take off... the ground that you are not going to retrim. You have got to retrim." (2T. 294, lines 11-13.) Pilot Picciano continued (2T. 288-289, line 7; and 308-309, line 2):

> "Q. Take off. And have you ever moved the trim when you are taking off in any of those planes?
>
> A. Yes, sir.
>
> Q. Does that tell you that you need to stop the plane and get out and go check to see what's in the back end, to see what's in the back end of that plane?
>
> A. No. Normally it is a fine adjustment after takeoff. You may not have had it just right, or you don't know the CG of the aircraft.

Just go and fly it. You make a minor adjustment.

Q. CG refers to what?

A. Center of gravity.

Q. When you are flying planes that you have never been in before, do you personally do a thorough search of it to make sure there is nothing illegal contained in the plane?

A. No.

Q. Do you know any pilot that does do that when he is getting in a plane for the first time, that it is not his plane and is somebody else's plane?

A. Only pilots I know are either police officers or ex-military. No, we never looked in the plane so to speak if there is anything back there.

Q. You just assumed there was nothing back there, right?

A. True."

*****

"Q. If one of you eight fellows who work in this particular South Texas area that we just discussed do not have prior information on a plane coming in, how easy would it be for a 185 Cessna like BEQ to fly in over a

country area between Mission and over to Rio Grande City, over that rural area, land, drop its load of 125 pounds of cocaine and get back up in the air and get back to Mexico without being caught?

A. Got 99 percent chance of success.

Q. Ninety-nine percent chance of success?

A. Chance of success."

U.S. Customs air officer Thomas J. DeMichelle testified that when he first went out to the plane after the dog search, he did not see any contraband in open view. (2T. 346.) DeMichelle did not find any weapon on the plane. (2T. 350.)

DEA special agent Mario Luis Alvarez testified that the value of this lawsuit's cocaine would be approximately thirty million dollars. Agent Alvarez has worked for DEA in Columbia and Aruba. A lot of the cocaine coming into the U.S. is coming from Columbia, Bolivia and Peru. "A bad

person" could buy 50 kilos of cocaine in one of those "source countries" for around $10,000 a kilo, buying such volume at wholesale. Thus, this lawsuit's 50 kilos would have cost someone down there $500,000. (2T. 371-373.) His cross-examination by petitioner's counsel concluded (2T. 387, lines 13-23):

> "Q. Isn't it true on the 21st of January that you did learn that Robert Gonzalez wanted to fly the plane up to Houston, Texas, to finish the trip so you police officers could catch the bad guys involved in this case?
>
> A. That is correct.
>
> Q. And he wanted to do that with DEA officers in his plane so he couldn't run away with the dope as you understand the proposition, is that right?
>
> A. Well, that is correct. But it was impossible to do it.
>
> MR. CONNORS: Pass the witness, Your Honor."

The government rested. (2T. 390.)

Petitioner testified in his own defense. (3T. 486-559.) On cross-examination petitioner testified he could not smell any odor of anything coming from the back compartment. (3T. 596.) Petitioner did not even know of the existence of a back compartment. (3T. 597.) Petitioner did not believe that Victor set him up. Petitioner was sure Victor did not know the cocaine was in the plane. The only way anybody could have discovered the cocaine other than by taking the plane apart was getting out a sniffer dog. (4T. 636-637.)

ARGUMENTS FOR GRANTING WRIT

REASONS FOR REVIEWING FIRST QUESTION

In the case at bar the trial court's prompt curative instruction was inadequate and the requested mistrial should have

been granted. Reversal should follow since petitioner's counsel (1) timely objected to the prosecutor's prejudicial remarks; (2) the prosecutor's "outside the record" remarks were not invited by petitioner's counsel's "inside the record" arguments to the jury; (3) the prosecutor's improper comments of "... he is the virus that spreads it through his airplanes" ***** "I thought he said he had flown several airplanes" ***** "He spreads --", were very calculated, purposeful, prejudicial and merely an extension of the prosecutor's extensive cross-examination of petitioner about numerous aircraft and flights on various planes mostly through the (narcotic world's) Golden Triangle in the Gulf of Mexico (3T. 563-570, 583-594, 603-605, 634-635); (4) with the strength of the

government's case being as weak as it was, there is no certainty of conviction without the improper statements; (5) there is not overwhelming evidence of guilt to eliminate any doubt that the prosecutor's remarks could be deemed either harmless beyond a reasonable doubt or of no prejudicial effect on the jury; and (6) after the district court denied petitioner's motion for mistrial, the prosecutor continued in the same vein but referred to future crimes to which objection was overruled by the district court. (Pet.App. 112-113.)

What was really going on here? Prosecutor Wolfe was inferring to the jury "his personal speculation on petitioner's continuous criminal smuggling activities prior to January 18, 1986." This was prosecutor Wolfe's deliberate, purposeful

and intentional means of "winning at all costs: ethics, professionalism and fairness be damned--his goal is to convict, legally or illegally." Prosecutor Wolfe's unsubstantiated but devastating unfairness needs correction for it deprived petitioner of a fair trial. The reviewer must remember what prosecutor Wolfe told all at the pre-trial conference (1T. 8):

> "MR. WOLFE: No, Your Honor. We have evidence that they entered the country on numerous occasions, but that evidence doesn't say that on the other occasions they were hauling cocaine or anything. I don't think it is evidence of other crimes. But before we get into that, the Government will approach the bench."

Nevertheless in this case, the Fifth Circuit Court's ruling that the improper prosecutorial reference to extraneous offenses at final jury argument was cured

by the trial court's prompt curative instruction conflicts in principle with United States v. Hastings, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). In Hastings, the Court of Appeals for the Seventh Circuit reversed the conviction for improper prosecutorial reference at final jury argument to the defendant's Fifth Amendment rights under Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The court declined to rely on the harmless error doctrine, stating that application of the doctrine "would impermissibly compromise the clear constitutional violation of the defendant's Fifth Amendment rights." United States v. Hastings, supra, 461 U.S. at 504, 103 S.Ct. at 1977. There, this Court reversed noting that since Chapman v. California, 386 U.S. 18, 87 S.Ct. 824,

17 L.Ed.2d 705 (1967), the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless. United States v. Hastings, supra, 461 U.S. at 510, 103 S.Ct. at 1980. There this Court also noted that, guided by considerations of justice, the federal court's use of the supervisory powers over prosecutors are three fold: (1) to implement a remedy for violation of recognized rights; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and (3) as a remedy designed to deter illegal conduct. Id., 461 U.S. at 506, 103 S.Ct. at 1978. There, turning then to the question of whether on the whole record the error identified by the circuit

court was harmless beyond a reasonable doubt, and guided by the circuit court's own explicit statement of "the magnitude of the crimes committed and the clear evidence of guilt" this court stated:

> The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

Id., 461 U.S. at 511-512, 103 S.Ct. at 1981. See also United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 1042, 84 L.Ed.2d 1 (1985). There, this Court stated that:

> Nearly a half century ago this Court counselled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction . . . ." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 74 L.Ed.2d 1314 (1935). The Court made clear, however, that the adversary

> system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.

In petitioner's case, the circuit court found the prosecutor erred but declined to reverse since the district court gave a prompt curative instruction. (Pet.App. 34-36.) In so doing, the circuit court did not take into consideration its own explicit statements of the weakness of the evidence to support petitioner's conviction, to-wit (emphasis added and footnote omitted):

> Although this is a close case, applying the above principles convinces us that the evidence was sufficient to convict appellant.
>
> *****
>
> Although we might have reached a different result had we been the jurors in this case, the evidence was clearly sufficient for the jury to have found

> appellant guilty beyond a reasonable doubt on the substantive counts of importation of cocaine and possession of cocaine with intent to distribute it.

(Pet.App. 15 and 21.) Moreover, in this case, the circuit court also ignored the inescapable conclusion that (a) the prosecutor's improper conduct was purposefully done to influence the minds of the jury against this petitioner; and (b) this prosecutorial misconduct was in direct violation of both the district court's explicit order and that prosecutor's express agreement to abide by that order.

At the March 31, 1986 pre-trial, the trial court resolved numerous pretrial motions. Among them, the court granted petitioner's motion requesting permission to join co-defendant's pretrial and trial motions (R. 197-198) so "[a]ny decision

will adhere to the benefit of each one of the defendants." (1T. 2-3.) Petitioner's Motion For James Hearing (R. 185-189) was carried along. (1T. 4.) In his motion in limine and for notice by the government of the intention to rely upon other crimes evidence (Pet. App. 48-65), petitioner apprised the district court and the government of the many prejudicial reasons, including the applicable law, as to why the government was not to refer to prior extraneous offenses, if any, without first approaching the bench to determine their admissibility. When the trial court took up petitioner's "similar acts" motion (R. 166-173; 1T. 7-8), this colloquy occurred:

> "THE COURT: *** Motion in Limine and for notice by the Government of the intention to rely upon other crimes evidence and for a continuance until such notice is

given. Are you saying that extraneous offenses --

"MR. CONNORS: There have been some inferences that my client has come in the -- Roberto has come into the United States many times in the past. Inferences he might have been doing drugs at that time or doing dirty money, laundering money. We are not trying that lawsuit.

"THE COURT: The Government is instructed if you make any reference whatever to extraneous offenses or similar acts of conduct of any of the defendants you are to first approach the bench before you use it. Do you know of any you are going to use?

"MR. WOLFE: No, Your Honor. We have evidence that they entered the country on numerous occasions, but that evidence doesn't say that on the other occasions they were hauling cocaine or anything. I don't think it is evidence of other crimes. But before we get into that, the Government will approach the bench.

"THE COURT: That's your instruction."

When the court took up petitioner's "Motion For Discovery and Inspection" (R. 141-158; 1T. 9, lines 10-19; 12, line 25 through p. 13, line 5; p. 14, line 3-7; p.

14, line 3; p. 15, line 16), this exchange occurred:

> "THE COURT: That's granted. Motion for Discovery and Inspection. If he has opened up his file to you -- is that what you said you did?
>
> "MR. WOLFE: Yes, Your Honor.
>
> "THE COURT: Is there anything further that you need to pursue in that regard, gentlemen?
>
> "MR. CONNORS: There were some matters in here that concerned things that were not in the file. Mr. Wolfe and I during the last recess were going through some of the items.
>
> *****
>
> "THE COURT: You are not to elicit any matters entailing extraneous offenses or similar acts of conduct on these defendants or any other individual without first approaching the bench.
>
> "MR. WOLFE: I understand, Your Honor.
>
> "THE COURT: Granted to that extent.
>
> *****
>
> "THE COURT: I am simply instructing you not to make reference of extraneous offenses or similar acts of conduct on the part of these

individuals or any other individual without first approaching the bench. That's my instruction to you. Anything else?

*****

"THE COURT: We are not going to be trying another offense.

"MR. CONNORS: That's what I don't want to be doing, Your Honor.

"THE COURT: The Government has been instructed in that regard. We are going to try this case. If at any time the Government attorney feels like he is entitled to bring in similar acts or conduct of any individual, he is to first approach the bench. If you consider it to be relevant, you are to defer from going into that without first approaching the bench. You will be so instructed.

"MR. WOLFE: Yes, Your Honor."

After all that precautionary pretrial work by the district court and opposing counsel, during the final part of his closing argument to the jury, prosecutor Wolfe made the comments that are now challenged. (Pet.App. 110-113; 4T. 696, line 1, through 699, line 5).

REASONS FOR REVIEWING SECOND QUESTION

Appellate acceptance of the trial court's challenged jury instructions would make it impossible for a defendant, in a case such as this, to effectively controvert one of the essential elements of the crime. The due process implications are apparent. Indeed, in this case the trial court also refused to give petitioner's timely filed requested written instruction No. 15, which read (R. 60; 4T. 724, lines 3-11):

> "If the defendant was ignorant of the fact that cocaine was in the plane in question, ignorance of that fact goes to the heart of both the defendant's denial of specific intent and the defendant's assertion that he was merely present but not involved in the offenses charged. If you find that the defendant had no knowledge that the plane contained cocaine, or if you have a reasonable doubt thereof, then you the jury must say Not Guilty by your verdict."

See also United States v. Escobar De Bright, 742 F.2d 1196 (9th Cir. 1984).

The way the court's instructions came down, the trial court mentioned that "Count No. 4 alleges the knowing and intentional possession" (4T. 707, lines 15-16) so "Before you can find the defendant guilty of Count No. 4 you must be satisfied from the evidence beyond a reasonable doubt that the defendant knowingly and willfully possessed the cocaine as charged." (4T. 708, lines 7-10.) But then the court erroneously instructed the jury that the jury could infer the possession element if one has control over a plane. (4T. 715-717.) On the facts of this case at bar, such an instruction amounted to a directed verdict on the defense of lack of knowledge that cocaine was aboard the plane petitioner

possessed. See United States v. Musgrave, 444 F.2d 755, 764-765 (5th Cir. 1971). Thus, the trial court committed reversible error by (1) removing lack of knowledge as a defense to the Counts 2 and 4 charges, (for if petitioner was driving, the jury could infer he possessed "it" PLUS if he possessed "it," he illegally imported "it"); (2) directing a verdict on the "lack of knowledge fact" issue that was for the jury to decide;[3] and (3) by instructing the jury, it can infer knowledge of the possession from the mere

---

[3] It is reversible error for the trial court to opine in its jury instruction as to the defendant's guilt beyond a reasonable doubt when "willfulness", an essential element of the statutory offense, had not been admitted. United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933) [where the trial court also improperly refused to instruct on a requested instruction as to defendant's good faith and actual belief].

fact of "being the pilot" when this testifying petitioner's sole defense was his good faith lack of knowledge that the plane was possessing contraband.

Although these objections were not made in the trial court, "they come within the purview of the plain error rule, Fed. R. Crim. P. 52(b)." United States v. Musgrave, 444 F.2d 755, 761-763 (5th Cir. 1971) [where the Court set out the law applicable also to the unique facts of this petitioner's case]. Plain error was committed when the trial court's instructions removed from the jury's consideration mistake of fact--ignorance of cocaine aboard--as petitioner's defense before the jury could convict on Counts 2 and 4. Griego v. United States, 298 F.2d 845, 847-849 (10th Cir. 1962). On this case's facts, the erroneous instruction was not

harmless beyond a reasonable doubt. Reversal must result. See and compare Vaccaro v. United States, 461 F.2d 626, 638-640 (5th Cir. 1972).

The circuit court concluded that the district court's instructions to the jury that "... you can infer a person has possession over something [the contraband] if ... he is the driver of a vehicle or pilot of a plane or the like" (emphasis added), did not improperly direct a verdict against petitioner on the issue of whether he knowingly possessed the contraband. As applied to the circumstances of this case, that appellate court's conclusion conflicts in principle with the Due Process Clause, and Francis v. Franklin, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). In Franklin, this

Court said that "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." Id., at 105 S.Ct. 1971. See also Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

Of course, this case involves neither a statutory presumption nor a mandatory presumption. It involves a permissible inference. That is why the circuit court rejected it offhand. The circuit court stated that since the jury could have accepted or rejected the inference that appellant's control over the airplane constituted possession of cocaine, the district court did not improperly direct a verdict against petitioner on the issue of whether petitioner knowingly possessed

cocaine. (Pet.App. 28-30.) By so concluding, however, the circuit court ignored the fact that "knowledge" of the existence of the contraband aboard the plane was the dispositive issue in this case, not whether petitioner merely possessed the contraband by the mere fact of being the airplane's pilot. The circuit court also ignored the fact that although perhaps a correct statement of the appellate test for sufficiency of the evidence, the challenged jury instruction is not one that reason and common sense justify in light of the proven facts before this jury. See Reasons For Review of Fourth and Fifth Questions Presented. Moreover, the circuit court below has also suggested "guilty knowledge" is not proved beyond a reasonable doubt from one merely being a paid driver of a vehicle laden

with millions of dollars worth of a controlled substance in a compartment which is not visible or readily accessible to the driver. See United States v. Del Alguila-Reyes, 722 F.2d 155, 157 (5th Cir. 1983); United States v. Ledesma-Hernandez, 729 F.2d 310, 314 (5th Cir. 1984). The circuit court also ignored the trial court's instructions that

> "[t]he charge of the Court is the law by which you will be governed in your deliberations. ***** You as jurors are Judges of the facts. But in determining what happened in this case, on ther (sic) words, in reaching your decision as to the facts, it is your sworn duty to follow the law that I am about now to define to you. ***** It is your duty to apply the law as I give it to you regardless of the consequences."

(4T. 699, lines 1-3, 7-11 & 22-24.) Thus, reason and common sense do not justify the

suggested conclusion and petitioner's Due Process rights were violated.

Based on the facts of this case, the trial court's instructions denied petitioner the right to contest that knowledge element of the contraband being in the airplane and earn an acquittal. How? As to Count 2, the trial court instructed that for a person to be guilty of importing cocaine into the U.S., he must have either actual or constructive possession. As to Counts 2 and 4, those instructions included:

> "Well, in order for a person to import he has to be guilty of possession. (4T. 709.) ***** You can also infer the matter of the element of possession from the fact that an individual has control over, let us say, a vessel or a plane or a car or a house. But in order for you to find that a person has either actual or constructive possession-- ***** ...you can infer a person has possession over something he has possession over something if he has control over it. For example, he is

the driver of a vehicle or pilot of a plane or the like. But do not forget that before you can find a person guilty of having something in his possession you must also be satisfied from the evidence beyond a reasonable doubt that the person knowingly and willfully had control over the matter. Please don't forget that. The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others." (4T. 715 to 717, line 4.)

REASONS FOR REVIEWING THIRD QUESTION

The circuit court held that petitioner, by agreeing to the amendment of the indictment "if it could legally be done," effectively waived prosecution by indictment and that the amended indictment thus constituted a valid information under which petitioner was prosecuted. These

holdings (1) are contrary to the facts of this case which clearly show that petitioner was prosecuted on an indictment; (2) fails to recognize that petitioner's waiver was conditioned by the statement "if it could legally be done"; and (3) are conflicting in principle with United States v. Norris, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076 (1930) and United States v. Miller, 471 U.S. ___, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). In Miller, this Court held that the indictment requirement is violated where (1) the defendant's conviction is based upon allegations not charged in the indictment; or (2) where the prosecutor amends the indictment altering or adding an essential allegation of the crime charged. The facts of this case clearly show that petitioner was tried on an indictment by a

grand jury. (R. 5-6.) In his opening remarks to the petit jury, the prosecutor said (1R. 37, lines 22-23): "The two defendants are being charged in four counts of the indictment." Moreover, the parties' agreement "to amend an indictment if it could legally be done,"[4] cannot create subject matter jurisdiction for the district court, since petitioner did not knowingly and intelligently waive prosecution by indictment. There was not substantial compliance with Fed.R.Cr.P. 7. Thus, the magistrate should not

---

[4] A review of the tape recording of the February 20, 1986 arraignment hearing before the U.S. Magistrate will demonstrate that the trial officials were not "unknowingly sandbagged". Petitioner's trial counsel pointed out that it was okay to so amend the indictment if it could legally be done. At that time, neither petitioner nor his counsel were aware of the legal impossibilities to making such an amendment valid.

have permitted the prosecutor to amend count 2 of this indictment by AUSA R. Guerra's crossing out the word "marihuana" and replacing it with the word "cocaine". (R. 5, 201; see docket entry for 2/20/86.) Without resubmission to a grand jury, this petitioner was tried and convicted of cocaine importation which is a crime other than the marihuana importation crime alleged in the indictment's count 2. Thus, petitioner was tried for and convicted of the amended count 2 not charged against him by the grand jury. That was a violation of his Fifth Amendment right to be tried only on charges in an indictment. The concept of harmless error is not applicable. See Stirone v. United States, 361 U.S. 212, 216-219, 80 S.Ct. 270, 27 2-274, 4 L.Ed.2d 252 (1960); United States v. Carroll, 582

F.2d 942, 943-945 (5th Cir. 1978) [where the Court reversed since plain error resulted from the trial court's sua sponte amendment of the conspiracy count in the court's charge to the Jury]; United States v. Stewart Clinical Laboratory, Inc., 652 F.2d 804, 807 (9th Cir. 1981) [where the Court reversed, holding that since the defendants were convicted of an offense not charged in the indictment, there was a fatal variance between the facts alleged in the indictment and the evidence produced at trial]; and United States v. Consolidated Launderies Corp., 291 F.2d 563 (9th Cir. 1961) [where the Court reversed as to one defendant because the substitution was more than "one of form only" when there was an amendment and insertion of a comma to the indictment, which "actually substituted as a defendant

a 1951 corporation for a dissolved 1941 corporation"]. Cf. United States v Ramirez, 670 F.2d 27 (5th Cir. 1982); United States v. Musgrave, 483 F.2d 327, 338-339 (5th Cir. 1973), cert. denied, 414 U.S. 1023, 94 S.Ct. 447, 450, 38 L.Ed.2d 315 (1973).

REASONS FOR REVIEWING FOURTH QUESTION

The circuit court erred in its sufficiency analysis by misconceiving as important the "trim evidence". In summarizing the evidence in this case, the circuit court incorrectly relied on and took out of context the emphasized statements in its following paragraph (Pet. App. 10-11)(emphasis added):

> Appellant and his brother were tried before a jury. As both sides concede on appeal, the principal issue in the case was whether appellant had knowledge that the cocaine was in the

concealed compartment. It was undisputed that the cocaine was not visible to the pilot, and that it did not emit an odor that was discernable to humans. The only evidence connecting appellant with the cocaine was the effect that the presence of that much cocaine in the storage compartment would have on the pitch of the airplane. The compartment in which the cocaine was found was a baggage compartment designed to hold 50 pounds. As stated above, the gross weight of the cocaine was 125 pounds, thus overloading the baggage compartment by 75 pounds. The government put on Louis L. Picciano, an experienced customs pilot, as an expert witness. He testified in response to a hypothetical question that the amount of cocaine loaded in the airplane in question would require the pilot on take-off to adjust the trim of the airplane to compensate for the added weight in the tail of the plane. Hence, Picciano testified, the added weight would definitely call a pilot's attention to the fact that there was something in the rear baggage compartment.

This inaccuracy in the circuit court's factual conclusions is shown by a

full review of the "trim" testimony of the Government's own trial expert. Pilot Picciano testified (1T. 294, lines 11-16):

> "A There is no airplane you take off -- once you set take-off trim, as soon as you get off the ground that you are not going to retrim. You have got to retrim.
>
> Q You have got to?
>
> A Everything is going to take effect on you. Wind, temperature, everything."

In its opening statement, the Government did not even mention "trim" as a circumstance upon which the Government would rely as evidence to support appellant's knowledge of the contraband in the airplane. (1T. 36-42.) "Trim" was testified to by three expert pilots. (For their "trim" testimony, see 2T. 278-294, 296, 302-303; 3T. 437-439, 441-452, 460-464, 473-476, 480-484, 511-514, 534, 546, 600; and 4T. 601-603.)

The Government agreed in its opening final argument that "This whole case boils down to one thing: Knowledge. That's what you are going to decide when you go to the jury room." (4T. 655.)

In final arguments, counsel for petitioner referred to the "trim" evidence and stated that (4T. 680-681):

> "Trimming was so important in this lawsuit. Remember. The man would have to know he is trimming a whole lot and that would tell him there was stuff in the back. How many pilots you heard from that would tell you that ain't true? Yet, that was their lawsuit at first. Switched it now. That was their lawsuit. Would have to know it was heavy in the back because it was 75 pounds overweight. And each pilot said it is an instinct matter. Just turn it a little bit. We will abandon that theory of our lawsuit. We will move on to something else."

Responding during final argument, the Government's prosecutor disclaimed any reliance for conviction on the "trim"

evidence. There that prosecutor said (4T. 688-689):

> "Mr. Connors pointed up about the trim. Let me tell you as a prosecutor, ladies and gentlemen, I have to anticipate what a defense might be. I don't think trim had anything to do with it but I knew Mr. Connors did. So I brought in a witness about trim. I'll tell you why trim didn't have anything to do with it because he knew it was there all the time."

In the context of this lawsuit's evidence, both parties' counsel agreed that trim was not a factor. Thus from that "trim evidence" neither the jury nor a reviewing court could conclude beyond a reasonable doubt that petitioner knew or should have known that the plane was carrying contraband. The circuit court and the jury erred in doing so.

Petitioner would point out that the Government's evidence merely showed that 125 pounds in the general baggage area

where the cocaine was found would cause a pilot to adjust the pitch. (2T. 280-282.) Additionally, the evidence showed the airplane in question to be a four-seater (3T. 462-463) and that petitioner performed "touch and goes" with his brothers Victor and Carlos, before embarking on his trip with Carlos to the United States. (3T. 509-511.) Thus, while it is true that the testimony showed that the 125 pounds of cocaine in the plane would have affected the trim, that same evidence was to the effect that the trim must be adjusted on every take-off and that every experienced pilot (like petitioner) does so instinctively without thinking. (2T. 302-303.) Moreover, 125 pounds "is not much weight" in an airplane like that petitioner was flying. (2T. 307.) To further assist the Court

herein, the summarized testimony of long-time commercial pilot and instructor Creighton Domina follows.

The Cocaine's Weight Was Unnoticeable:

Creighton Domina worked for the past 26 years for McCreery Aviation in McAllen, Texas at the Miller International Airport. Domina had been a commercial pilot since 1939. He was also an instructor. (3T. 435.) Domina had been out to see the airplane depicted in Government's Exhibit No. (hereinafter GE#) 3 and Defense Exhibits Nos. (DE#) 11, 12 and 13. That that plane had a STOL kit installed "So you have flaps the whole length of the wing which increases the lift terrifically." (3T. 437.) Domina had between 18,000 and 20,000 hours flying as a pilot. (3T. 441.) As depicted in DE# 38, the elevator trim adjusts the nose,

and the rudder trim adjusts the rudder pressure. The engine pulls to the left on take off, so that is why there is a rudder trim. It is "The control on the tailend in an airplane." The trim is the wheel that when rolled forward, it puts the nose down, and when rolled back the nose goes up. (3T. 442-443.) The tailend of the airplane depicted in DE# 13 shows the elevators and the horizontal stabilizer. The front part is called the horizontal stabilizer. The back part is called the elevators. The elevators are controlled by the steering wheel. The trim raises the stabilizer. It corrects for any change of weight in the aircraft. (3T. 444-445.) Domina testified that assuming the back cargo area of the plane was supposed to handle up to 50 pounds of baggage in Baggage Compartment 2, but that

on the day in question Baggage Compartment 2 contained 125 pounds of items, that section would have been overweight by 75 pounds. Domina would not consider 75 pounds overweight at that location to make a great deal of difference, "where you would even notice it." It would make a considerable difference if you brought that weight clear back to the tail. But back where counsel told him it was, it would not be noticeable. "... [I]f you did notice a little bit of tail heaviness, you would just naturally reach down and get this wheel and give it a turn of -- maybe a quarter of a turn." (3T. 445-446.) "... [Y]ou wouldn't think anything about it. You might think maybe the trim was misadjusted or something." It would not raise a flag in his mind that something was there. An experienced

pilot would automatically reach down and turn the trim. (3T. 447-448.) Domina assumed further that the same pilot had been doing touch and goes down in Guatemala with Baggage Compartment 2 overweight by 75 pounds two days prior to the date the police found the cocaine. Domina would assume that the pilot would have found out where the trim was on that airplane. "The first-take off, if he had to readjust the trim, after he set it, I would assume that he would notice where it was. And any other take-off after that that is where he puts it, for every take-off. And there would be no other adjustments needed." Two days later when he takes off on his trip from Guatemala to Veracruz and on into McAllen Airport, Domina would not think it would go through his mind that something was wrong in the

plane. "The position of the trim took care of the situation. I wouldn't normally think anymore about it. That was where I put the trim for take-off from now on." To make sure the plane is airworthy, Domina would (3T. 450):

> "... make a pre-flight inspection of the aircraft. That's normal procedure. You walk around the airplane and you check everything there is to be checked, such as you check to see if all the controls are working properly and all the bolts are in it. You check the engine and the oil. You check -- if you are going to make a long flight, you are going to get up and check your fuel. Not only by the gauges but by looking in the tank, if you want them full. And you make a complete walk around the airplane and check all the control system to make sure everything is working. And then get in the airplane, crank it up and go."

Domina would not take off any panels off to check what is stored in the back luggage compartment that is hidden away by a panel that is screwed in. Normally,

Domina does not check the back end. (3T. 451.) Domina would not do it himself, but an experienced pilot could land and drop whatever they had and then come back to Customs and go through Customs and then later go back over there and pick it up. "Very easily." Domina had just noticed a brand new panel strip west of Mission. "There are plenty of places." (3T. 554.) There being too many places where a pilot who knew there was contraband in the plane flying into the United States could land, Domina could not see why anybody would go right over to Customs and check for clearance. (3T. 455.)

On cross-examination, Domina stated that regardless whether storage compartment 2 was rated for 50 pounds, the weight in there is what affects the pitch. If you put 50 pounds in there, or 125

pounds, you are going to have to adjust the pitch. "That also is taking into consideration you have got two 180 pound people in the back seat, too. If you don't have 180 pound people in the back seat, you could carry a little extra back there." Whether you know about it or not, when you take off you are going to feel the weight and make adjustments if it is enough to amount to anything. (3T. 462-463.) Even when you are in flight after having taken off, you might have to adjust the trim. (3T. 474.)

On redirect examination, Domina testified that based on the hypothetical where the man was doing touch and goes two days before he flew into the United States, if there were the pilot and two passengers, one sitting in the back seat, the trim would have to be adjusted. Thus,

the pilot would have to make a slight change in the trim when getting airborne without the third person in the back seat. (3T. 480-481.) With the hypothetical, one little movement of the trim wheel would probably take care of 75 pounds overweight in the back end. "It is very sensitive." He would only have to move the trim "very, very little" to compensate for the weight. (3T. 483.)

REASONS FOR REVIEWING FIFTH QUESTION

The circuit court's finding that the evidence is sufficient to support petitioner's conviction, but characterizing the evidence as "this is a close case" and "we might have reached a different result had we been the jurors in this case," conflicts in principle with Glasser v. United States, 315 U.S. 60, 62

S.Ct. 457, 86 L.Ed. 680 (1942), In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

In this case, the circuit court, believing that a verdict of not guilty would have been the result had the circuit court judges been the jurors in this case, nevertheless let stand petitioner's conviction. Despite its expressed belief that the government had failed to carry its burden of proof, the circuit court affirmed petitioner's conviction on possible jury conclusions as to certain facts (1) which do not amount to proof beyond a reasonable doubt of every element of any of the four offenses for which petitioner stands convicted; and (2) which permit pro and con speculation that

petitioner was aware that the plane was loaded. Under such circumstances, the definition of "beyond a reasonable doubt" and the central purposes it serves should mandate an appellate judgment of acquittal.

In a drug conspiracy, the Government must prove these essential elements beyond a reasonable doubt: (1) an agreement between two or more persons to commit the alleged underlying substantive drug offense; (2) that the accused conspirator knew of the alleged conspiracy; (3) that that accused had the deliberate, knowing, and specific intent to join the conspiracy; and (4) that that accused knowingly and voluntarily joined that conspiracy. United States v. Williams-Hendricks, 805 F.2d 496 (5th Cir. 1986)

Petitioner's innocence or his guilt seems equally plausible from the evidence. The circuit court has said that it will not "lightly infer a defendant's knowledge and acquiescence in a conspiracy." United States v. Jackson, 700 F.2d 181, 185 (5th Cir. 1983), cert. denied, 464 U.S. 842, 104 S.Ct. 139, 78 L.Ed.2d 132 (1983). Presence preceding and at the time of the arrest has never been sufficient on appeal to sustain a conspiracy conviction. United States v. Littrell, 574 F.2d 828, 833, 834 (5th Cir. 1978).

In order for sufficient evidence to support a conviction for possessing cocaine with intent to distribute it, the evidence must show beyond a reasonable doubt the accused's (1) knowing (2) possession of cocaine (3) with intent to

distribute it. United States v. Williams-Hendricks, supra.

When measured against these standards, the evidence presented at petitioner's trial is not sufficient to support his substantive convictions either as a principal or as an aider and abettor. Absent evidence that petitioner actually knew there was cocaine in the airplane, a reasonably minded jury should have had a reasonable doubt as to the existence of petitioner's "knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance." United States v. Stephenson, 474 F.2d 1353, 1355 (5th Cir. 1973); United States v. Glasgow, 658 F.2d 1036 (5 Cir. 1981). In short, there was no proof that this petitioner had knowing possession, actual or constructive. See

also United States v. Jackson, 526 F.2d 1236, 1237 (5th Cir. 1976) [where the Court reversed because "... there is no evidence that he [Jackson] exercised any measure of dominion or control over the contraband"].

It was unreasonable for the jury to infer that petitioner had knowing and willful possession of the cocaine because the evidence, viewed in the light most favorable to the Government, does not show that petitioner knew that anything was hidden behind the back wall of the passenger compartment. From the evidence before the jury, it is entirely possible that even though he was the pilot (1T. 163), petitioner did not know that cocaine was in the airplane. Petitioner's fingerprints did not match any of the prints developed on the packages of

cocaine. Being the unknowing pilot of a hidden odorless cargo, just ain't enough to satisfy the government's constitutional burden for sustaining convictions. Accordingly, petitioner's substantive Counts 2 and 4 convictions should be reversed and acquittals ordered. The verdict of the jury in this case is in direct conflict with what the Supreme Court said in Jackson v. Virginia, supra, 443 U.S., at 320, 99 S.Ct. at 2789:

> Any evidence that is relevant--that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed.Rule Evid. 401--could be deemed a "mere modicum." But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt.

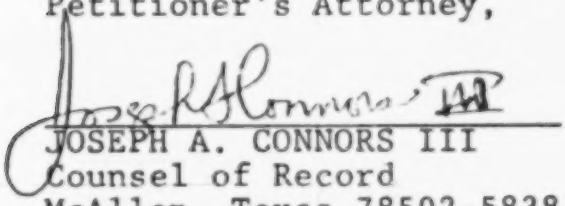
CONCLUSION

For those reasons, Gonzalez respectfully suggests that the questions

presented previously to the circuit court are ripe for resolution by this Court. Of course, this Court may wish to grant certiorari here in light of the significant impact Gonzalez' questions will have on all lower federal courts. Here this Court could resolve, once and for all, this case's trial and appellate issues. Those issues are of crucial importance. This Nation is trying to not lose its War on Drugs. That War is ultimately being waged, in courtrooms throughout this country, when prosecutors attempt to properly obtain convictions and long sentences for serious traffickers. The Bench and Bar need this Court's immediate instructions on "how to do it right the first time." Gonzalez provides that teaching tool.

DATED: March 26, 1987.

Respectfully submitted by
Petitioner's Attorney,



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

NO. _____

ROBERTO ANTONIO GONZALEZ-CALLES,

Petitioner

V. UNITED STATES OF AMERICA,

Respondent

APPENDIX ATTACHED TO PETITION FOR

WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

RELEVANT CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS

The Constitution's Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

28 U.S.C. 1254(1) provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ....
> > (June 25, 1948, C. 646, 62 Stat. 928.)

28 U.S.C. 1291 provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.
> (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

18 U.S.C. 3231 provides in part:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
> (June 25, 1948, C. 645, 62 Stat. 826.)

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by

him or another would be an offense against the United States, is punishable as a principal.
(June 25, 1948, ch 645, § 1, 62 Stat. 684; as amended Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

21 U.S.C. 812 provides schedules of controlled substances as follows:

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

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Initial schedules of controlled substances

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

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Schedule II

(a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: ...

> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine and their salts, isomers, derivatives), and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

(Pub.L. 91-513, Title II, § 202, Oct. 27, 1970, 84 Stat. 1247; Pub.L. 95-633, Title I, § 103, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 507(c), 509(b), Oct. 12, 1984, 98 Stat. 2071, 2072.)

21 U.S.C. 841 provides (footnote omitted):

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ....

Penalties

(b) Except as otherwise provided in section 845 or 845a of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of—

(I) coca leaves;

(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

(III) a substance chemically identical thereto;

(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

(iii) 500 grams or more of phencyclidine (PCP); or

(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 40 years, a fine of not more than $500,000, or both

(B) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than

$125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

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(c) Special parole term

A special parole term imposed under this section or section 845 or 845a of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was

spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 or 845a of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2068, 2070.)

21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the minimum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
(Pub. L. 91-513, Title II, § 405A, as added Pub. L. 98-473, Title II, § 503(a), Oct. 12, 1984, 98 Stat. 2069.)

21 U.S.C. 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, ...

(Pub.L. 91-513, Title III, § 1002, Oct. 27, 1970, 84 Stat. 1285; Pub.L. 95-633, Title I, § 105, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 519-521; Oct. 12, 1984, 98 Stat. 2075.)

21 U.S.C. 960. Prohibited acts A

Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substances, ...

shall be punished as provided in subsection (b) of this section.

Penalties

(b)(1) In the case of a violation under subsection (a) of this section involving—

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(B) a kilogram or more of any other narcotic drug in schedule I or II;

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the person committing such violation shall be imprisoned for not more than twenty years, or fined not more than $250,000, or both.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance in schedule I or II, the person committing such violation shall, except as provided in paragraphs (1) and (3), be imprisoned not more than fifteen years, or fined not more than $125,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(Pub.L. 91-513, Title III, § 1010, Oct. 27, 1970, 84 Stat. 1290; Pub.L. 98-473, Title II, § 504, Oct. 12, 1984, 98 Stat. 2070.)

21 U.S.C. 963. Attempt and conspiracy

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
>
> (Pub. L. 91-513, Title III, § 1013, Oct. 27, 1970, 84 Stat. 1291.)

28 U.S.C. 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect substantial rights of the parties.
> (May 24, 1949, C. 139, § 110, 63 Stat. 105.)

Fed.R.Cr.Proc. 52 provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.